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*Attorney for Plaintiff  
Dr. Anna Vertkin*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Dr. Anna Vertkin,  
Plaintiff,  
vs.  
Michael Vertkin, and Does 1-20,  
Defendants

) Case No.: C 07 4471  
)  
) **PLAINTIFF DR. ANNA VERTKIN'S  
OPPOSITION TO DEFENDANT  
MICHAEL VERTKIN'S MOTION TO  
DISMISS, LACK OF SUBJECT MATTER  
JURISDICTION AND RES JUDICATA,  
FAILURE TO STATE A CLAIM ON  
WHICH COURT CAN GRANT RELIEF  
FRCP RULE 12(B)(1), FRCP RULE  
12(B)(6); POINTS & AUTHORITIES IN  
OPPOSITION; DECLARATION OF  
ROBERT L. SHEPARD IN OPPOSITION;  
PROPOSED ORDER**  
)  
) Date Action Filed: August 29, 2007  
)  
) MOTION DATE: November 16, 2007  
) TIME: 10:00 am  
) LOCATION: 17<sup>th</sup> Floor, Courtroom 1  
)  
)

**TO ALL PARTIES, THEIR ATTORNEYS OF RECORD AND THE COURT:**

Plaintiff Dr. Anna Vertkin opposes Defendant Michael Vertkin's Motion to Dismiss for lack of subject matter jurisdiction and res judicata, Failure to state a claim on which courts can grant relief under FRCP Rule 12(b)(1), and FRCP Rule 12 (b)(6) on the grounds that there is in fact a valid claim arising under a federal statute, that these issues are a separate matter than the family court matter, and that all claims stated do in fact allow a court to grant relief. Opposition

1 is based on the attached Points & Authorities, Declaration from Robert L. Shepard, the  
2 pleadings, file and records in the above-entitled action and such oral and documentary evidence  
3 as may be presented at the hearing on this motion.  
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6 Dated: October 19, 2007

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7 Robert L. Shepard, Attorney for Plaintiff  
8 Dr. Anna Vertkin

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*Attorney for Plaintiff  
Dr. Anna Vertkin*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Dr. Anna Vertkin,  
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## **STATEMENT OF FACTS**

Defendant Michael Vertkin was properly served with a 9 page<sup>1</sup> verified Complaint for violations of 18 US Code Section §2511 (2 Counts), 18 US Code Section § 1001, 42 US Code 1301, Part C section §1177, California Business and Professional Code Section § 22947.2 (b)(1), Trespass to Chattel and Invasion of Privacy- Intrusion of solitude.

<sup>1</sup> The 9-page complaint also contained Case Management Conference information.

- 1        1. Plaintiff Dr. Anna Vertkin, filed this complaint on August 29, 2007.
- 2        2. Defendant, Michael Vertkin filed a motion to dismiss on September 28, 2007,
- 3                  based on three theories, all of which are incorrect.
- 4        3. Plaintiff and Defendant are currently litigating an Dissolution of Marriage.
- 5                  Although some facts might be relevant to both litigations, the matter before
- 6                  this code is for the alleged violation of the U.S. Code, and is independent of
- 7                  the state court family law matter.
- 8        4. We disagree with Defendant's motion in its entirety, as argued below, and ask
- 9                  the court NOT TO GRANT this motion to dismiss.

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14                  **LEGAL ARGUMENTS**

15

16                  **I. Issues are not precluded under Res Judicata.**

17                  The complaint in the case at hand is pled properly. Each cause of action states a violation  
18 of either a Federal Code, or a California law. Each cause states a specific violation of a code,  
19 and how the Defendant has violated that code to the detriment of the plaintiff, Dr. Anna Vertkin.

20                  It appears from Defendants motion that he is making the argument of *issue perclusion*.  
21 While the issues that are discussed in the statement of facts in the instant suit have some  
22 similarity to those that are being tried in the family law matter, they are separate and unique to  
23 this action based on the fact that violations of both Federal and State laws have occurred. This  
24 case, and whether of not the U.S. Code was violated, is not a family law state court matter. The  
25 statement of facts in the instant case are utilized to show a time line of events which are offered  
26 as proof of defendant violating various Federal and State Codes as listed throughout the  
27 complaint.  
28

1 Issue perclusion would bar the relitigation of factual issues that have already been  
 2 determined by a judge or jury. In Defendants own Motion to dismiss, (in the very first paragraph  
 3 of his Points and authorities motion) he states that the family law case is still pending (see line  
 4 18-19, page 1 of Defendants Motion to Dismiss res judicata, lack of subject matter jurisdiction,  
 5 failure to state a claim case c 07 4471-1). By definition, the case must be determined by a judge  
 6 or jury to qualify it from being barred in other pending litigation. It is clear from defendants own  
 7 language that this adjudication has not been met.

8 The defendants' argument is based, in essence, over a temporary restraining order (TRO).  
 9 The original complaint filed by the plaintiff mentions the TRO as a way to show that defendant,  
 10 Michael Vertkin, had been put on notice. The TRO was used to establish that defendant was not  
 11 to remove/transfer or alter in any manner, any financial holdings with relation to Dr. Anna  
 12 Vertkin. Despite the TRO, defendant proceeded to electronically transfer almost Seventy  
 13 Thousand dollars (\$70,000.00) from Dr. Vertkin's account to one he established solely in his  
 14 name, without her permission. This act is a direct violation of 18 USC § 2511, and California  
Buisness and Professional Code §22947.2(b)(1).

16 The TRO issue raised by the plaintiff is moot. Additionally, the family law matter is in  
 17 no way relevant to this matter, furthermore, the family law matter plaintiff rests his argument  
 18 regarding res judicata upon is still pending. Regardless of the outcome of that matter, the  
 19 statement of facts in the instant case are relevant for showing the occurences that led up to the  
 20 various causes of actions in the original complaint for relief based on Federal and State Code  
 21 violations.

22 Therefore, we ask the court to deny plaintiffs motion to set aside the complaint based on  
 23 Res Judicata.

25 **II. Claims for relief are stated in each cause of action and in the conclusion.**

26 Each of the seven causes of action listed in this complaint state the violation of Federal or  
 27 State Code, how Mr. Vertkin violated the code in question, and what the result of that harmful  
 28 action was. Each are plead with particularity, and ask for specific relief.

1           Defendant claims that no statements made in the statement of fact section of Plaintiffs  
 2 original brief support the first listed Cause of Action in the complaint, violation of 18 USC  
 3 §2511.

4           The specific language of 18 USC §2511 states that anyone who “intentionally  
 5 intercepts....any wire, oral, or electronic communication” or “intentionally uses,...any  
 6 electronic, mechanical or other device to intercept any oral communication when such device is  
 7 affixed to, or otherwise transmits a signal through wire, cable or other like connection used in  
 8 wire communication...”

9           Lines 10-12 in Plaintiffs original brief describe when and how a computer program called  
 10 “spyware” was installed on the computer of Dr. Vertkin. This program allows the user to capture  
 11 all the keystrokes utilized during a session on a computer, without the person who is using the  
 12 computer having any knowledge. Plaintiff alleges that this program allowed information to be  
 13 received electronically by Mr. Vertkin.

14           Lines 13 and 14, in the original brief describe how the intercepted information was used  
 15 to cause injury to Dr. Vertkin. These lines correlate specifically to the Second Cause of Action,  
 16 a second violation of 18 USC §2511. Lines 13 and 14 offer proof of how the information which  
 17 was obtained via an illegally installed “spyware” program, was then used to open several lines of  
 18 credit in the name of Dr. Vertkin, as well as transfer thousands of dollars from her brokerage  
 19 account.

20           Defendant argues that the fourth Cause of Action does not state a claim for relief. In fact,  
 21 the cause as listed is for violating 42 USC 1301, Part C section §1177. Specifically, line 14 of  
 22 the statement of facts states that Mr. Vertkin changed the mailing address of Dr. Vertkin’s  
 23 private practice to be re-routed to his new address.

24           The Section of the 42 USC 1301 quoted states that a person “ who knowingly and in  
 25 violation of this part obtains individually identifiable health information relating to an  
 26 individual..” (emphasis added). Mail from a doctor’s office undoubtedly contains information  
 27 relative to individual patients. Re-directing this mail without the knowledge or consent of the  
 28 physician would be a direct violation of this Code.

1       The entirety of Defendants various arguments that no claim is made upon which relief  
 2 can be granted, are invalid. Each claim raised is specifically supported by the statement of facts,  
 3 each claim states where/how the defendant violated the Federal or State Code involved and  
 4 finally, each claim asks for specific relief for the harm caused to Dr. Vertkin by the defendant.  
 5 Therefore, we ask this court to rule against the motion to dismiss based on the failure to state  
 6 claim upon which relief can be granted.

7       Even if defendant's arguments were in any way correct on this point, the proper remedy  
 8 would be to demur and grant leave to amend. Defendant's motion however does not request this  
 9 as a remedy.

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11                   **III. Federal Court is the proper jurisdiction for filing this complaint against**  
 12                   **Defendant.**

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14       Defendant argues that United States District Court is not the proper jurisdiction for the  
 15 instant case. Under the powers granted by Article III, Section 2 of the Constitution of the United  
 16 States, any case that arises out of a violation of a federal law is adjudicated in a federal court.

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18       The Plaintiffs original brief contained four causes of actions, all in violation of specific  
 19 sections of the US Code. Because a US Code violation was involved, Federal Court is proper  
 20 jurisdiction. Further, both Defendant and Plaintiff reside in Marin County, California. Marin  
 21 County is in the Northern District of the four Federal Courts of California, therefore, this is the  
 proper court for the instant case to be heard.

22

23       The remaining three causes of action listed in Plaintiffs original complaint are also  
 24 properly adjudicated in Federal Court. If a complaint sets forth a claim "arising under" federal  
 25 law, the district court *may* (discretionary) adjudicate *state law claims* that are transactionally  
 26 related to the federal claim. This includes claims both against original parties and any properly-  
 joined new parties. [See [28 USC § 1337\(a\)](#)].

27

28       The State Claims are all transactionally related to the federal claims in that each is an  
 outcome of the action defendant took while violating the rights of Dr. Vertkin. As discussed in  
 the original complaint, Mr. Vertkin violated California Business and Professional code by

1 installing unauthorized computer software on Dr. Vertkin's computer. By using this information  
2 for his own personal gain, he also committed trespass to chattel and invasion of privacy-  
3 intrusion of seclusion. These pendant claims can, and should, be heard in Federal Court based  
4 on their connection to the prior four Causes of Actions.

5 Defendant wrongly asserts that this matter is a family law matter. This could not be  
6 further from the truth. The issue is not a community property issue. While Plaintiff  
7 acknowledges that there is a pending divorce matter in Marin County court, the case at hand is a  
8 **separate matter**. The instant case accuses Defendant of violating several *Federal Laws*. Each  
9 one is punishable by delineated fines or jail time. Federal Code violations should not be heard in  
10 family court. As discussed above, the proper place for the issues that arise under federal law to  
11 be heard is Federal Court.

12 Therefore, Defendants assertion that Federal Court is the improper jurisdiction should be  
13 denied as invalid and improper.

14

15 **CONCLUSION**

16 Plaintiff respectfully requests:

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18 1. That this motion be denied.

19 2. That the Defendant be ordered to pay Plaintiff's reasonable attorneys fees and costs  
20 incurred in Opposition to this motion.

21 3. And any other relief the court deem just and proper.

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Dr. Anna Vertkin*

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Dr. Anna Vertkin,  
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Defendants

) Case No. C 07 4471 SC  
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)  
**DECLARATION OF ROBERT L.**  
**SHEPARD IN SUPPORT OF**  
**OPPOSITION TO DEFENDANT**  
**MICHAEL VERTKIN'S MOTION TO**  
**DISMISS, LACK OF SUBJECT MATTER**  
**JURISDICTION AND RES JUDICATA,**  
**FAILURE TO STATE A CLAIM ON**  
**WHICH COURTS CAN GRANT RELIEF,**  
**FRCP RULE 12(B)(1), FRCP RULE 12**  
**(B)(6).**  
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Date Action Filed: August 29, 2007  
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MOTION DATE: November 16, 2007  
)  
TIME: 10:00 am  
)  
LOCATION: 17<sup>th</sup> Floor, Courtroom 1

I, Robert L. Shepard, do hereby declare:

1. I, Robert L. Shepard, am an attorney in good standing licensed to practice in the State of California, State Bar number 197240.
2. I, Robert L. Shepard, represent the plaintiff, Dr. Anna Vertkin.
3. Prior to filing this complaint, I was made aware of the pending family law dissolution of marriage action between Michael Vertkin, and my client Dr. Anna Vertkin.

1 Under penalty of perjury of the laws of the State of California, I Robert L. Shepard, declare  
2 the above to be true and accurate to the best of my knowledge and belief.  
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6 Dated:

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Robert L. Shepard

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5 *Attorney for Plaintiff*  
6 *Dr. Anna Vertkin*

7  
8 UNITED STATES DISTRICT COURT  
9  
NORTHERN DISTRICT OF CALIFORNIA

10 Dr. Anna Vertkin, ) Case No. C 07 4471 SC  
11 Plaintiff, ) [PROPOSED] ORDER  
12 vs. ) Date Action Filed: August 29, 2007  
13 Michael Vertkin, and Does 1 to 20, ) MOTION DATE: November 16, 2007  
14 Defendants ) TIME: 10:00 am  
15 ) LOCATION: 17<sup>th</sup> Floor, Courtroom 1

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16 The motion of Defendant Michael Vertkin to Dismiss in case number C 07 4471 SC  
17 came on regularly for hearing by the court on November 16, 2007 at 10:00 am in Courtroom 1,  
18 17<sup>th</sup> Floor. Plaintiff Dr. Anna Vertkin appeared by counsel Robert L. Shepard. Defendant  
19 Michael Vertkin appeared in pro-per.

21 Having read the motion papers submitted by the parties, and having considered the  
22 pleadings, file and records in this action, along with the arguments of the parties by their  
23 attorneys:

25 IT IS HEREBY ORDERED that Defendant Michael Vertkin's Motion to Dismiss is  
26 denied. The Defendant is ordered to pay Plaintiff's reasonable attorneys fees and costs incurred  
27 in Opposition to this motion.

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Judge of the United States District  
Court of the Northern District of California